ME COURT, U. S.

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Supreme Court, U.S.
FILED
OCT 27 1971
E. ROBERT SEAVER, CLERK

IN THE

Supreme Court Of The United States

October Term, 1971
No. _____

NEVILLE M. TUCKER,
Petitioner

versus

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1971
No. ————

NEVILLE M. TUCKER,
Petitioner

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION OF WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The petitioner, Neville M. Tucker, asks that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit made and entered on September 27, 1971 affirming the judgment made and entered on June 24, 1971 in the Western District of Kentucky. On October 14, 1971 the motion for bail of the present petitioner, pending the filing of a petition for writ of certiorari, was granted.

OPINIONS IN THE COURT BELOW

The trial court, United States District Court for the Western District of Kentucky, revoked peti-

tioner's probation and rendered an oral opinion from the bench which has been reprinted in Appendix A, infra. The United States Court of Appeals for the Sixth Circuit rendered an opinion affirming the trial court which has not been published but is reprinted in Appendix B, infra.

The trial court rendered an oral opinion from the bench overruling petitioner's motion for new hearing based on newly discovered evidence which is reprinted in Appendix C, infra. The United States Court of Appeals for the Sixth Circuit issued an order on Motion to Affirm, summarily affirming the District Court (Appendix D, infra).

JURISDICTION

The final judgment of the United States Court of Appeals for the Sixth Circuit was entered on September 27, 1971. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1). The petitioner claims that the revocation of his probation was procured in violation of due process as secured by the Constitution of the United States, that the Court of Appeals below has rendered a decision which conflicts with the decision of another Court of Appeals on the same or comparable matter, that it has decided Federal questions contrary to applicable decisions of this Court, and has sanctioned such a departure from the usual course of judicial proceedings by the district court below as to warrant the exercise of this Court's power of supervision.

QUESTIONS PRESENTED

I. Was petitioner's probation revoked in the ababsence of evidence, contrary to the Due Process clause of the Fifth Amendment as interpreted by this Court?

II. Were the conditions of probation which the pettitioner allegedly violated so vague and overbroad as to render them unconstitutional?

III. Did the Government fail to prove that the petitioner violated his probation by subsequently violating the requirements of 26 U.S.C.A. §7203?

IV. Was the lower court required by the Due Process clause of the Fifth Amendment to hold an evidentiary hearing concerning petitioner's alleged violation of probation?

THE CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

UNITED STATES CONSTITUTION

Amendment V:

> "No person shall * * * be deprived of life, liberty or property, without due process of law; * * *"

STATUTES OF THE UNITED STATES

Title 26 §7203:

> Any person required under this title to pay any estimated tax or tax, or required by this title or by regulations made under authority thereof to make a return (other than a return required under authority of section 6015, keep any records, or supply any information, who willfully fails to

pay such estimated tax or tax, make such return, keep such records, or supply such information, at the time or times required by law or regulations, shall in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 1 year, or both, together with the costs of prosecution.

STATEMENT OF THE CASE

The only significant and relevant chronology in this case is the following:

1. On November 23, 1970, petitioner received a six month probated sentence in the United States District Court for the Western District of Kentucky.

2. On May 26, 1971, the District Court revoked his probation because petitioner allegedly had not filed his 1970 income Tax Return on or before April 15, 1971.

3. While an appeal to the United States Court of Appeals for the Sixth Circuit was pending, on May 28, 1971, the Internal Revenue Service granted the petitioner an extension of time, for which he had timely applied, to file his 1970 tax return. On June 18, 1971, the Sixth Circuit affirmed the District Court's order.

4. The District Court overruled the petitioner's motion for a new hearing on this newly discovered evidence, on June 24, 1971.

5. Petitioner again appealed to the United States Court of Appeals for the Sixth Circuit which entered judgment on September 27, 1971 on motion to affirm, affirming the District Court.

The petitioner, Neville M. Tucker, is a black attorney, a prominent leader in the black community, and is the Judge of the Louisville Police Court—the highest elected black official in the City of Louisville.

On November 23, 1970 the petitioner entered a plea of nolo contendere to the information filed by the United States Attorney, charging him with three violations of 26 U.S.C. §7203, i.e., willfully and knowingly failing to file income tax returns with the Director of Internal Revenue for the years 1964, 1965, and 1966. He was given a six month sentence on each count to run concurrently and a fine of $500.00 on each count, to be paid thirty days after his civil tax liability was established.

The sentences of imprisonment were suspended, and, accordingly, petitioner was placed on probation for a period of one year, on condition that he pay a total of $11,000.00 as a credit against his tax liability, including penalty and interest, for the years 1964, 1965 and 1966. Such condition was met.

It was further ordered that petitioner conduct himself as a law-abiding, industrious citizen and observe such conditions of probation as the Court may prescribe (TR #6).[1]

May 17, 1971, James L. Hurd, Chief Probation Officer, filed with the District Court a Petition for Action of Court for Cause, requesting the petitioner

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[1]TR stands for Transcript of Record, which, in this case, has been consolidated by the District Court from the two appeals. The record for each appeal had its own item numbering system. Therefore, the Justices may want to consult the certified copies of the contents of record before proceeding.

to appear at a hearing in order to determine whether his probation should be revoked. The Petition for Action of Court for Cause alleged that an attempt to determine whether petitioner had filed his ". . . Federal income taxes for 1970 produced negative results in that no tax return could be located nor any evidence that an extension had been granted." The petition prayed that the Court order:

1. "That a summons be issued for Neville M. Tucker to appear for a hearing, and
2. That he be ordered to produce evidence that he is a recipient of a timely extension from Internal Revenue Service, and
3. He should be ordered to produce evidence that he has filed his Municipal and State Tax for 1970 or produce evidence of timely extensions. The purpose of the hearing is to determine whether the probation order on November 23, 1970, be revoked." (TR #7).

The petitioner filed a response to the petition on May 24, 1971 accompanied by exhibits showing:

1. That application for extension of time for filing a Federal return was timely filed.
2. That applications for extensions of time to file the State and Municipal returns were timely filed and petitioner was granted until June 15, 1971 to file said returns.

However, through inadvertence, petitioner failed to answer Question 5 of the Federal Application for Extension of Time and consequently it was returned

with the notation "Please complete #5; return within 10 days /s/ Everett L. Meek." The petitioner returned his completed Federal application for extension of time. He filed his Federal Tax return on May 22, 1971.

On May 26, 1971, the petitioner with his attorneys, appeared before Judge James F. Gordon. Respondent appeared and made no effort to present any evidence to sustain the allegations of the Petition (Appendix A). In response, petitioner presented copies of his timely applications for extensions of time to file his Federal, State and Municipal forms (TR #9). The District Court did not direct the production of any evidence supporting Respondent's Petition. Instead, it said that, "This Court looks only to whether it is being respected; whether its leniency is being violated and whether or not in its grant of leniency and regard for this Defendant, he is playing fair and honest and shooting straight with this Court. Now, that is all I look to" (Appendix A). Applying these standards the Court revoked petitioner's probation and ordered him placed in custody for six months (TR #10).

On May 26, 1971, a Notice of Appeal to the United States Court of Appeals for the Sixth Circuit was filed. While this appeal was pending, the Internal Revenue Service acted upon Mr. Tucker's completed request for extension of time, and on May 28, 1971, granted the extension giving him until June 15, 1971, to file his return. At the time of oral argument on the appeal, petitioner's counsel advised the Sixth Circuit Court of Appeals of newly discovered evidence, name-

1-, the extension having been granted by the Internal Revenue Service. (On June 11, 1971, while the appeal was still pending, petitioner filed a motion asking the District Court to request the Sixth Circuit to remand the case to the District Court in order that these newly discovered facts could be considered by the District Court.)

On June 15, 1971, the District Court entered an order granting petitioner's motion for a new hearing and set the hearing for June 24, 1971, "to hear everything that this Defendant desires to offer to it . . ." (The Sixth Circuit, prior to this hearing, rendered its decision on June 18, 1971, and stated at page 4, that it was not necessary for it to remand in order for the District Court to consider the newly discovered evidence, stating that the Circuit Court was not required to consider and determine questions not presented to the District Court.)

The petitioner's motion for new hearing based on newly discovered evidence was supported by his affidavit. This motion and affidavit were filed pursuant to Rule 33 of the Federal Rules of Civil Procedure and asked the Court to grant a new hearing based on the following newly discovered evidence:

1. That on June 4, 1971, petitioner received from the Internal Revenue Service an Approval of Application for Extension of Time until June 15, 1971, to file individual income tax return (Form 1040) for the taxable year ending December 31, 1970.

2. That this information was not available to the affiant's attorney or the Court on May 26, 1971, when a Revocation of Probation Hearing was held in the above styled action, for the approval was granted on May 28, 1971, and received by petitioner on June 4, 1971.
3. That pursuant to the extension mentioned above and pursuant to Approval of Extension of Time until June 15, 1971, to file City of Louisville and Kentucky State Income Tax Returns, said Federal, State and City Income Tax Returns have been timely filed.

The petitioner also filed a Motion to Reinstate Probation based upon the newly discovered evidence. As stated, the opinion of the Sixth Circuit was rendered on June 18, 1971, and the District Court subsequently, on June 24, 1971, held its hearing on all of the petitioner's motions based on the newly discovered evidence, reconsidering the entire matter of the revocation of petitioner's probation. The District Court stated, at the conclusion of the hearing, "accordingly, the motions this day filed are overruled and the Court reaffirms its order of revocation heretofore entered on May 26, 1971 as affirmed by the United States Court of Appeals for the Sixth Circuit, on June 18, 1971" (Page 41, Transcript of Proceedings, June 24, 1971, Appendix C). An appeal was taken to the Sixth Circuit Court of Appeals. The United States made a Motion to Affirm in the Sixth Circuit under Rule 8 of that court. On September 27, 1971, the Sixth Circuit issued an Order on Motion to Affirm,

summarily affirming the District Court, and ordered the mandate to issue forthwith. On October 14, 1971, Mr. Justice Stewart granted petitioner's Motion for Bail pending the filing of this Petition, over the objection of the Government.

REASONS FOR GRANTING THE WRIT

I.

THE PETITIONER'S PROBATION WAS REVOKED IN THE ABSENCE OF EVIDENCE, CONTRARY TO THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT, AS INTERPRETED BY THIS COURT.

SUMMARY OF THIS REASON

Petitioner's probation was revoked by the trial court on the "assumption" that Internal Revenue Service would not grant Petitioner's timely application for extension of time to file his 1970 Income Tax Return. The "assumption" upon which probation was revoked was later proved erroneous when the Internal Revenue Service did grant the request for extension of time. In spite of this fact, the trial court refused to set aside the revocation and the Sixth Circuit summarily affirmed on a Motion to Affirm without the benefit of briefs or oral arguments from the parties. There being no evidence upon which to revoke Petitioner's probation and sentencing him to six months in prison, to do so is a violation of due process of law.

The flimsiness of the evidence here is exemplified in the statement of the case. Revocation of probation on such evidence brings the decision in this case into conflict with the decision of this Court in *Thompson* v.

Louisville, 362 U.S. 199 (1960); *Garner* v. *Louisiana,* 368 U.S. 157, 163 (1961); *Washington* v. *United States,* 357 U.S. 348 (1958); *Shuttlesworth* v. *City of Birmingham,* 382 U.S. 87 (1965). If it be considered that only the evidence is involved here, this Court should determine whether there was any evidence to support the order revoking petitioner's probation and whether it was a clear abuse of discretion for the trial court to refuse to grant a hearing to petitioner in light of newly discovered evidence.

The Petitioner's probation was revoked on May 26, 1971. An appeal was taken to the Sixth Circuit Court of Appeals. While the appeal was pending, Petitioner filed, in the District Court, (1) a motion asking the District Court to request the Sixth Circuit to remand the appeal in order that the District Court might consider newly discovered evidence, (2) a motion for new hearing based on newly discovered evidence, pursuant to Rule 33 of the Federal Rules of Criminal Procedure, and (3) a motion to set aside the order of revocation of May 26, 1971, and to reinstate Defendant's probation based upon newly discovered evidence.

The Petition filed by the probation officer on May 17, 1971, with the District Court, which sought a hearing "to determine whether the probation ordered on November 23, 1970 be revoked" was based solely on the allegation that Petitioner had not filed his 1970 federal income tax return and that there was no evidence that an extension had been granted or even requested. That Petition further asked the Court to order Petitioner to appear for a hearing and (1) ". . . produce evidence

that he is the recipient of a timely extension from Internal Revenue Service", and (2) ". . . produce evidence that he has filed his Municipal and State taxes for 1970 or present evidence of timely extension" (TR #7).

The Court, on May 18, 1971, signed an order making the above mentioned probation petition a part of the record and ordered a summons issued, directing Petitioner to appear for a hearing on May 26, 1971, and "to produce evidence of filing Federal, State and Municipal tax returns for the year 1970" (See Docket Entry of May 18, 1971, TR #1). The Petitioner filed his response to the petition, in which he stated that on April 14, 1971, prior to the time required to file Federal, State and Municipal Tax Returns, he filed timely applications for extensions of time in which to file said returns. Four exhibits were made a part of the response. Exhibit A was a Form 2688, Application for Extension of Time to File U. S. Individual Income Tax Return, stamped "received" by the Internal Revenue Service on April 15, 1971, and bearing the signature of Everett L. Meek (TR #9). This Exhibit had been received by the Internal Revenue Service on April 15, 1971, and returned to Petitioner with the handwritten notation, "Please complete #5; return within 10 days." Question #5 asked whether the taxpayer was required to file a declaration of estimated tax in the year for which the extension was being requested, and if so, whether payment was made on or before the due date. Petitioner submits that he sufficiently answered that part of the petition filed

by the probation officer, which requested information about the filing of his 1970 Federal Income Tax Return, by showing that he had timely filed a request for extension, although it was still pending. Petitioner also sufficiently answered that part of the Petition requesting information about his 1970 State and Municipal Tax returns.

Exhibit B was a Request for Extension of Time for Filing his Kentucky Income Tax Return. It was mailed April 14, 1971, to the Commonwealth of Kentucky, Department of Revenue, Frankfort, Kentucky, stamped "Extension Approved" by stamped signature of William R. Reed, Director, Income Tax Division, and it granted Petitioner until June 15, 1971 to file his State return (TR #9). Exhibit C to the response was an "Approval of Request for Extension" from the Commissioners of the Sinking Fund, granting Petitioner until June 15, 1971, to file his Municipal return (TR #9). Exhibit D to the response was a copy of Petitioner's 1970 Income Tax Return, which had been filed before the filing of the response (TR #9). This 1970 return was filed on a 1969 form which had been corrected to read "1970." Petitioner used the 1970 tax rate in computing the taxes (Appendix A). The return had been mailed on May 22, 1971, together with the Request for Extension which had been completed by answering question #5 (Transcript of Proceedings of May 26, 1971, pages 12-13, Appendix A).

The hearing was held as scheduled on May 26, 1971. No evidence was presented and no witnesses were introduced to support the allegations of the petition.

After argument of counsel, the Trial Court clearly indicated that he was revoking Appellant's probation because of his failure to file the 1970 Federal return on time and because Appellant was not going to receive an extension because he had not answered question #5 (Transcript of Procedings of May 26, 1971, pages 16, 17, Appendix A):

> "Now, on April 14, 1971, the day before his 1970 income tax return was due to be filed, he filed an application for an extension of time to file. When the Court examines this application, the Court finds Question No. 5 not answered and that question is the real crux of whether a taxpayer gets an extension or not and that is 'Has he paid all of his estimated tax for the year on which he wants an extension?'
>
> "Now, you are a lawyer and you are held to that standard closely and you are bound to know, as a lawyer, that this application for an extension would not be granted or approved when there was no reference on there as to whether you had paid estimated taxes if you owed it.
>
> "So, of course it was returned so you got no federal extension. So, when you filed a 1970 Income Tax return due April 15, 1971, on May 22nd you didn't file it on a 1970 form, but you took a 1969 form and marked it over and made it 1970, but the rates had been changed and the information to be disclosed to the government had been changed by law.
>
> "Now, Mr. Haddad makes some mention here that there is no violation of the law; that there is no willfulness; there is no intent.

> "Well now, those standards are not the standards applicable to probation grace at the hands of this Court. This Court looks only to whether it is being respected; whether its leniency is being violated and whether or not its grant of leniency and regard for this defendant, whether he is playing fair and honest and shooting straight with this Court. Now, that is all I look to."

In other words, it was clear and apparent that the Trial Judge felt certain that Petitioner was not going to be granted an extension of time by the Director of Internal Revenue and, therefore, declared that the Petitioner had failed to file a timely 1970 Federal Return. This order was appealed. The United States Court of Appeals for the Sixth Circuit held that the District Court did not abuse its discretion in revoking probation because Appellant had neither filed his 1970 income tax return, paid his taxes on or before April 15, 1971, when due, nor procured an extension of time for filing thereof (Opinion of the Sixth Circuit, June 18, 1971, Appendix B).

At the hearing on Petitioner's motion for a new hearing based on newly discovered evidence pursuant to Rule 33 of the Federal Rules of Criminal Procedure and to set aside the order of probation and reinstate probation held on June 24, 1971, Petitioner presented the newly discovered and uncontradicted evidence that the extension of time had in fact been granted, proving, without question, that the Trial Court had revoked Petitioner's probation based on a proven erroneous assumption. In spite of this overwhelming evidence,

the Trial Court still refused to correct the error made in revoking Petitioner's probation. This was a clear abuse of discretion by the Trial Court.

The District Court Judge had before him motions which, in fact and substance, sought a new hearing or new trial for the Appellant based upon newly discovered evidence which had occurred subsequent to the Court's earlier decision revoking Appellant's probation. Rule 33 of the Federal Rules of Criminal Procedure states:

> "The court on motion of a defendant may grant a new trial to him if required in the interest of justice. * * * A motion for a new trial based on the ground of newly discovered evidence may be made only before or within two years after the final judgment, but if an appeal is pending the court may grant the motion only on remand of the case. * * *

As stated in Rule 33, a motion for a new trial based on the ground of newly discovered evidence, may be made only before or within two years after final judgment, but if an appeal is pending, the Court may grant the motion only on remand of the case. Petitioner followed the precise procedure required by Rule 33 by requesting the District Court to have the Sixth Circuit Court of Appeals remand the case and to grant him a new hearing based upon the newly discovered evidence. No one can seriously question the District Court's authority to grant a new hearing based on newly discovered evidence and to reinstate the Appellant's probation. The Sixth Circuit Court

of Appeals recognized as much on page 5 of its Opinion in the original appeal of the *United States of America* v. *Neville M. Tucker,* No. 71-1432, decided June 18, 1971, (Appendix B).

If the District Court denies the motion for a hearing on the grounds of newly discovered evidence, this denial is a final and appealable order. *Smith* v. *United States,* 294 F. 2d 771 (9th Cir. 1961); *Smith* v. *United States,* 283 F. 2d 607 (D.C. Cir. 1960); *United States* v. *Provoo,* 215 F. 2d 531 (2nd Cir. 1954). Newly discovered evidence does not appear on the record supporting the judgment, and the only possibility for the review of the rulings lies in an appeal from the denial of a motion for a new trial. *Hamilton* v. *United States,* 140 F. 2d 679 (D.C. Cir. 1944). In *United States* v. *Stone,* 291 F. 2d 396 (2nd Cir. 1960), the Court held that, under all of the circumstances, including the circumstance that facts alleged in the affidavits attached to the notice of motion for new trial would, if believed by the jury, seriously undermine any basis for convicting the defendant, denial of the motion was error. The facts in the instant case are parallel to the *Stone* case and merit the same reversal of the denial of the motion by this Court.

The remarks by the Trial Court on June 24, 1971, disclose the Court's complete disregard of fact and law and its abuse of discretion in overruling Petitioner's Motion for a Hearing Based Upon Newly Discovered Evidence and his Motion to Reinstate Probation (TR #6).

"Preliminarily to the disposition of the three motions pending in this matter, this Court would like to clearly express and assure to all persons including defendant's counsel, within the hearing of the Court, that the tenure and the independence of the Federal Judiciary under our Constitution, places this Court in a position where there is no power on earth able to intimidate it.

"This includes the power of the Internal Revenue Service, the power of any press or other news media, and the power of those uninformed persons who are passionately motivated to action by results rather than by facts.

"I adopt the factual background in this matter as expressed in the recent opinion herein in the United States Court of Appeals for the Sixth Circuit bearing date of June 18, 1971.

"Further, it is my considered judgment from the motions and documents filed this date before me and the arguments heard that the subsequent, unilateral, improvident, and what I consider to be inconsiderate action toward me in this matter pending in my court by the Internal Revenue Service to be of absolutely no legal significance as it affects my discretion.

"There is no necessity legally, for the granting by the Internal Revenue Service of the extension of the filing of the return for the year 1970, when in actual fact a return on a 1969 form, changed to read 1970, had previously, belatedly, been filed by this defendant.

"Defendant, as a lawyer, knows that once a return has been filed, he has the perfect

liberty to file an amended return and he needs no extension.

"The actions of the defendant and the Internal Revenue Service subsequent to the revocation by me, are merely efforts to catch up some stitches missed in the hemming of defendant's garments.

"Accordingly, the motions this day filed are overruled and the Court reaffirms its order of revocation heretofore entered on May 26, 1971, as affirmed by the United States Court of Appeals for the Sixth Circuit on June 18, 1971."

The foregoing passage is the best evidence of the Trial Court's abuse of discretion. The Internal Revenue Service is part of the Federal Executive branch of our Government, while the Trial Court here is an intricate part of the Judiciary branch. The former is charged with the execution of the laws and the latter interprets those same laws. A clear abuse of discretion exists where, as here, Petitioner was caught in the cross-fire of displeasure which the Trial Court aimed at the Internal Revenue Service. The Trial Court inferred that there was no necessity, legally, for Petitioner to file the completed request for extension of time when he filed his return, and that this would avail him nothing. The Trial Court was in error. The reason Petitioner filed the completed request for extension of time was to avoid the assessment of the 5% penalty for late filing, as provided in the Internal Revenue Code Sec. 6651(c).

Petitioner was also denied Due Process of law because there was, and still is, no evidentiary basis

upon which his probation could be revoked. Income Tax Regulation 1.6081-1(a), concerning Extensions of Time for Filing and promulgated by the Internal Revenue Service, states that:

> "(a) * * * *An extension of time for filing an income tax return shall operate to extend the time for the payment or any installment thereof unless specified to the contrary in the extension."* * * * (Emphasis added)

In the Extension of Time for Filing (TR #4), the Internal Revenue Service extended Appellant Tucker's time for filing his federal income tax return until June 15, 1971. The fact that he accompanied the resubmission of his application for extension of time to file with his federal income tax return did not render the later granted extension moot. Nothing in the Income Tax Regulations declares that the accompaniment of an income tax return with an application for an extension of time to file renders the later granted extension a nullity or deems the completed return filed as of the date of the application for the extension. Such reasoning is contrary to federal law! Further, nothing contained in the Internal Revenue Service's extension of time to file specifies that Petitioner's particular extension of time fails to "operate to extend the time for the payment of the tax" in his particular case.

Since Petitioner received an extension of time for filing his federal income tax return, in accordance with Internal Revenue Service procedures, it is con-

clusive that he had not committed any illegal act. More important, the grant of the extension of time for filing his income tax return totally conflicts with the Trial Court's reasons for revoking Petitioner's probation and means that the revocation order is left standing without any evidentiary foundation.

This Court has held that, where there is no evidence to support a conviction, it is a violation of due process of law to punish the defendant. *Thompson* v. *City of Louisville,* 362 U.S. 199; *Garner* v. *Louisiana,* 368 U.S. 157, 163; and *Washington* v. *United States,* 357 U.S. 348. Another recent case reversed by the Supreme Court, for the reason that there was no evidence to support the conviction, is *Shuttleworth* v. *City of Birmingham,* 382 U.S. 87 (1965), which held that there was no evidence whatever in the record to support the conviction and that to convict and punish one without evidence of his guilt was a violation of due process:

> "Five years ago this Court decided the case of Thompson v. City of Louisville, 362 US 199, 4 L.ed. 2d 654, 80 S.Ct. 624, 80 ALR 2d 1355. There we reversed the conviction of a man who had been found guilty in the police court of Louisville, Kentucky, of loitering and disorderly conduct. The proposition for which that case stands is simple and clear. It has nothing to do with concepts relating to the weight or sufficiency of the evidence in any particular case. It goes, rather, to the most basic concepts of due process of law. Its application in Thompson's case turned, as Mr. Justice Black pointed out, 'not on the sufficiency of the

> evidence, but on whether this conviction rests upon any evidence at all.' 362 US at 199, 4 L.ed. 2d at 655, 80 ALR 2d 1355. The Court found there was 'no evidence whatever in the record to support these convictions,' and held that it was a 'a violation of due process to convict and punish a man without evidence of his guilt.' 362 US at 206, 4 L.ed. 2d at 659, 80 ALR 2d 1355. See also Garner v. Louisiana, 368 US 157, 7 L.ed. 2d 207, 82 S.Ct. 248."

Once all the evidence had been produced, it was clear that there was no evidence to support the order revoking Petitioner's probation. To punish him without evidence that he violated his probation is a violation of Due Process of law and certainly a clear abuse of discretion which should be corrected by this Court.

II.

THE CONDITIONS OF PROBATION WHICH THE APPELLANT ALLEGEDLY VIOLATED ARE SO VAGUE AND OVERBROAD AS TO RENDER THEM UNCONSTITUTIONAL.

The original conditions of probation imposed by the Court in its order of November 23, 1970 are so vague and overbroad as to render them unconstitutional. Construing the Due Process Clause of Fifth Amendment in the same manner as the Due Process Clause of the Fourteenth Amendment, this Court has required that a criminal statute fix on its face an ascertainable standard of guilt. *Cline* v. *Frink Dairy Co.,* 274 U.S. 445, 458 (1927). Fair notice has long been a requirement of due process of law. *Conally* v.

General Construction Co., 269 U.S. 385, 391 (1926). *Lanzetta* v. *New Jersey*, 306 U.S. 451, 453 (1939). See also *United States* v. *L. Cohen Grocery Co.*, 255 U.S. 81 (1921); *Baggitt* v. *Bullitt*, 377 U.S. 360, 367-70 (1964); *Cramp* v. *Board of Public Instruction*, 368 U.S. 278, 287 (1961); *Collins* v. *Kentucky*, 234 U.S. 634, 638 (1914); *International Harvester* v. *Kentucky*, 234 U.S. 221-23 (1914); *Champlin Refining Co.* v. *Commission*, 286 U.S. 210 (1932); *Yu Cong Eng.* v. *Trinidad*, 271 U.S. 500 (1926).

A vague statute fundamentally negates the rule of law embodied in the Due Process Clause by permitting and encouraging more or less arbitrary and erratic arrests and convictions. An overly vague criminal law, this Court has recognized, "licenses the jury to create its own standard in each case." *Herndon* v. *Lowry*, 301 U.S. 242, 263 (1937). *NAACP* v. *Button*, 371 U.S. 415 (1963), *Thornhill* v. *Alabama*, 310 U.S. 88 (1940).

Petitioner contends that these due process considerations for statutory interpretation apply equally to standards set out in probation orders. Both set forth standards of conduct and both prescribe penalties for non-compliance. Further support for the Petitioner's contention is evidenced by the numerous court pronouncements on the need for due process safeguards in probation orders. In *Campbell* v. *Aderhold*, 36 F. 2d 366 (N.D. Ga. 1929), the Court stated that "conditions or probation ought to be definite and made plain to the probationer . . ." See also *Hollandsworth* v. *United States*, 34 F. 2d 423 (4th Cir. 1929).

The conditions must be sufficiently clear and explicit so that both the defendant and the probation officer will have notice thereof.

Finally, in *United States* v. *Chapel,* 428 F. 2d 472 (9th Cir. 1970), in reversing the lower court's revocation of probation, the Court stated at 474 that:

> "The conditions of probation were set forth in general terms and were, in our opinion, insufficient adequately to notify Chapel that he would risk revocation of probation by engaging in his acts of protest.

Petitioner contends that the conditions of his probation which required that he act "as a law-abiding, industrious citizen and observe such conditions of probation as the Court may prescribe" are examples of those conditions which the courts have repeatedly struck down as being violative of due process of law. The Petitioner paid the $11,000.00 tax liability set out in the Order of Probation, but the remaining conditions were not nearly as specific, and offered Petitioner no guidelines as to what conduct was inimical to the Court's thinking. Certainly these infirmities loom even larger when it is shown that Petitioner never engaged in any criminal conduct necessary for revocation of his probation.

III.

THE GOVERNMENT FAILED TO PROVE THAT THE APPELLANT VIOLATED HIS PROBATION BY SUBSEQUENTLY VIOLATING THE REQUIREMENTS OF 26 U.S.C.A. § 7203.

26 U.S.C.A. § 7203 reads in part that "[A]ny person . . . who *willfully* fails . . . to make such return . . . shall . . . be guilty of a misdemeanor . . ." (emphasis added). Critical to any successful prosecution under this Section is proof that such failure was willful.

In *Murdock* v. *United States,* 290 U.S. 389 (1933), and *Spies* v. *United States,* 317 U.S. 492 (1943), this Court defined "willful" as used in the context of Section 7203 of the Internal Revenue Code.

The trial court bypassed questions as to whether the Petitioner had exhibited the requisite specific evil intent necessary to show a violation of the law. Instead, the only standards employed were those designed to see whether Petitioner was "shooting straight with this Court" (Appendix 5a). The trial court had a duty to go beyond conclusions about the Petitioner's respect for the Court and determine whether he had intentionally and willfully violated the law and therefore the conditions of his probation.

As found in the Statement of the Case, Petitioner's actions, when viewed as a whole, are conclusive that Petitioner was neither denying nor avoiding his tax liability. His actions never indicated any specific intent and Respondent totally failed to prove that such intent existed.

IV.

THE LOWER COURT WAS REQUIRED BY THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT TO HOLD AN EVIDENTIARY HEARING CONCERNING APPELLANT'S ALLEGED VIOLATION OF PROBATION.

Appellant respectfully contends that the question of whether he violated his probation can only be properly determined at a due process or evidentiary hearing. Such a hearing is necessary to determine whether in fact there exists any competent evidence to show that he has breached a condition of his probation.

The old theory that probation is a "contract," wherein the probationer waives all of his due process rights connected with revocation, has been most recently overturned by the Fourth Circuit in *Hahn* v. *Burke*, 430 F. 2d 100 (7th Cir. 1970); *Carioscia* v. *Meisner*, 10 Cr.L. 2008 (Decided September 10, 1971, D.C. Ill.); *Bearden* v. *South Carolina*, 9 Cr.L. 2231 (4th Cir. 1971); *Klotz* v. *Ohio Adult Parole Authority*, 10 Cr.L. 2012 (N.D. Ohio 1971).

Probation has also been said to be privilege and not a right. However, it is a privilege that, once granted, cannot be taken away without due process of law.

CONCLUSION

Because there was no evidence to support the revocation of probation, thereby depriving petitioner of due process of law, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

FRANK E. HADDAD, JR.
Counsel for Petitioner

JAMES A. CRUMLIN
Of Counsel

APPENDIX

APPENDIX A

ORAL OPINION OF THE DISTRICT COURT
May 26, 1971 Transcript of Proceedings

(The captioned matter was called by the Court Clerk at about the hour of 9:30 A.M., on Wednesday, May 26, 1971, and the following proceedings occurred:)

By the Court: All right; gentlemen.

Mr. Tuggle: Your Honor; this case is before you this morning on the summons issued from this court for Mr. Tucker to appear and produce evidence of timeliness in filing Federal, State and Local taxes for the year 1970, or timely extensions to file.

The summons was issued on May 19th and on May 24th Mr. Tucker filed a response attaching as exhibits, four documents; Exhibit A, which I believe Your Honor has, is an application for extension of time for filing Federal Taxes. The exhibit itself shows that it was returned as incomplete, with directions to complete and resubmit it within ten days.

There is no indication in the record or the exhibits attached that show that this was re-submitted or that timely extension was granted.

Exhibit D, which also accompanies the response,

is a copy of a 1970 income tax return on behalf of Mr. Tucker and his wife, Phyllis, dated May 22nd, 1971, and Exhibit B and Exhibit C represent, uh, "B" represents an extension of time granted by the Kentucky Department of Revenue. The application is dated April 4th. The date the extension was approved is not indicated, and Exhibit C is an approval of request for extension by the Commissioners of the Sinking Fund, dated—the date of submission is not

indicated, but the date of approval is indicated as April 22, 1971.

Those are the facts before Your Honor this morning. The question is whether or not these are sufficient to show compliance with the conditions of probation under which Mr. Tucker now rests.

By the Court: Mr. Haddad

Mr. Haddad: Yes, sir; if Your Honor please, in the response we have set forth that the request for extension to file the 1970 United States Individual Income Tax return was filed on April 14th.

The application was returned and noted on the application that it was received on April 15th by the Department of Revenue with the notation to complete certain portions—certain omitted information and

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submit it within—return it within ten days with reference to the extension requested.

The application for extension to the Department of Revenue of Kentucky and the application to the Commissioners of the Sinking Fund was made on the same day—set forth in our application. The other two extensions were granted.

The request for the extension for the Federal Tax return was not acted upon as such, but the return was subsequently filed on May 22nd, and I might point out to Your Honor that even in the return that was filed Mr. Tucker has not, or did not as yet have the information that was necessary to complete the return and the information that he stated on his request for an extension was needed by him.

He paid certain taxes immediately following the imposition of sentence in this case totaling, I think,

$11,000, and there is some question in his mind how that was to be applied, or how much, if any credit, that—that was to be taken.

In addition to that, he does his own tax returns and to show Your Honor that he really didn't even have a '70 form, he scratched over and used a '69 form, but he said that he made allowance in the

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form for the change in the tax rate and the surcharges, I believe. I might point out to Your Honor that the fact that he did apply for the extension the day before that the return was due, is certainly evidence of his part of no willfulness to violate any law and I don't think that any law has actually been violated in this instance.

In other words, I am saying to Your Honor that there has been no commission of any crime and I don't think that there has been any evidence here of any evil motive or willful intent even to commit a crime. His 1970 return is going to have to be amended because he didn't take his deductions.

He is still uncertain about the deductions and things that he needs to properly assert in order to get credit as far as the tax is concerned and there was over $3,000, I believe that is indicated on that return that was withheld from salaries and applying this and without any deductions, there is only, I think, a $1,400 amount balance, but with the deductions that would either be completely eliminated, or erased. In fact, he may even have a refund coming.

By the Court: Do you have anything to say, Mr. Tucker?

Oral Opinion of the District Court
May 26, 1971 Transcript of Proceedings

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Mr. Tucker: No, sir; except to reiterate what Mr. Haddad has said, and certainly I had every intent to file, uh, follow the law and file what I felt was, uh, timely extension. When I talked with Mr. Hurd I did not physically put my hand on the application that had been returned to indicate it had been returned, which as soon as I found it, uh, in the file, I sent it, uh, to the lawyers and they have tried to, very assiduously, follow both the law and the regulations, income tax regulations. That's all that I would say to the Court.

By the Court: Well, gentlemen; let me say this; at the time Mr. Tucker appeared before me in response to the indictment, he holding a position of public trust at the hands of the voters of the City of Louisville, being a prominent leader of the black community, the Court felt that the Court should temper justice with absolute and total mercy that there not be created in this community any feeling that this Court did not give equal justice to all persons who appeared before it.

In that spirit, the Court allowed Mr. Tucker to enter a plea of nolo contendere. The Court fixed a sentence and a fine and the Court placed him on

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probation. Now, it must be remembered that he was charged with failure to file income tax returns for certain past years.

Now, on April 14, 1971, the day before his 1970 income tax return was due to be filed, he filed an application for an extension of time to file. When the Court examines this application, the Court finds

Question No. 5 not answered and that question is the real crux of whether a taxpayer gets an extension or not and that is, "Has he paid all of his estimated tax for the year on which he wants an extension?"

Now, you are a lawyer and you are held to that standard closely and you are bound to know, as a lawyer, that this application for an extension would not be granted or approved when there was no reference on there as to whether you had paid estimated taxes if you owed it.

So, of course it was returned so you got no federal extension. So, when you filed a 1970 Income Tax return due April 15, 1971, on May 22nd you didn't file it on a 1970 form, but you took a 1969 form and marked it over and made it 1970, but the rates had been changed and the information to be disclosed to the

government had been changed by law.

Now, Mr. Haddad makes some mention here that there is no violation of the law; that there is no willfulness; there is no intent.

Well now, those standards are not the standards applicable to probation grace at the hands of this Court. This Court looks only to whether it is being respected; whether its leniency is being violated and whether or not its grant of leniency and regard for this defendant, whether he is playing fair and honest and shooting straight with this Court. Now, that is all I look to.

Now, I felt that in this case, in the public interest and in Mr. Tucker's interest and in an effort to do justice I leaned over backward and then I find myself confronted with this situation, and, it is the order

of this Court that the probation be revoked and the marshal take him into custody to serve the time fixed.

Now, in the interest of justice and safety I would not confine him with his own prisoners in the Jefferson County jail. I will confine him in the New Albany jail —the Federal jail in New Albany.

Mr. Haddad: Would Your

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Honor withhold imposition of that sentence until tomorrow morning?

By the Court: Yes, sir; he can surrender tomorrow morning.

APPENDIX B

OPINION OF SIXTH CIRCUIT COURT OF APPEALS—June 18, 1971

Before Weick, Peck and Brooks, Circuit Judges.

Per Curiam. Appellant, a Judge of the Police Court of Louisville, Kentucky, pleaded nolo contendere to a three-count information charging him with failure to file federal income tax returns for the years 1964, 1965 and 1966, although his gross income for said years respectively was $24,154.83, $23,398.00 and $30,229.74. The District Court accepted the plea on November 23, 1970, and found the defendant guilty as charged. He was sentenced to six months' imprisonment on each count, the sentences to run concurrently, and he was fined $500 on each count, payable thirty days after final determination of his income tax liability for the years 1964, 1965 and 1966.

The Court suspended execution of the sentence of imprisonment and placed appellant on probation for a period of one year, conditioned on his payment of $11,000 as a credit against his income tax liability for the tax years involved. It was further ordered that during the period of his probation appellant should conduct himself as a law abiding, industrious person and observe such conditions of probation as the Court may prescribe. The conditions of his probation, which were furnished to him, required that he report to the Probation Officer as directed and that he refrain from any violation of law (federal, state and local).

On May 17, 1971, an Official Report was presented to the Court by its Chief Probation Officer, showing violations of the conditions of appellant's probation, which violations included failure to file his income tax return for the year 1970 on or before the date it was

due, namely, April 15, 1971, or failure to obtain an extension of time for payment. An order was issued by the Court and served on appellant, requiring him to appear and show cause why his probation should not be revoked for violation of the conditions thereof.

A Memorandum For Revocation Proceedings was prepared by the Chief Probation Officer on May 24, 1971, which indicated that appellant did not timely file his 1970 income tax return due on April 15, 1971, or make a timely request for extension, although on May 14, 1971 he had reported to the Chief Probation Officer that a timely extension had been filed and explained that the extension granted would expire in three days. Appellant did, however, file an income tax return on a 1969 income tax form on May 22, 1971. In his application for extension, which was not filed until April 15, 1971, he did not answer relevant questions therein contained as to whether he had paid the instalments due on his estimated tax return for 1971. The application was returned to him with instructions to complete the answers to the questions and to return it in ten days, which he neglected to do within said period of time.

The District Court conducted a hearing on the show cause order on May 26, 1971, at which hearing the appellant appeared and was represented by counsel. Both appellant and his counsel made statements to the Court. The Court found that appellant had violated the conditions of his probation and entered an order of revocation.

Upon appellate review of an order revoking probation, the question—

> ". . . is simply whether there has been an abuse of discretion, and is to be determined in accordance with familiar principles governing the exercise of judicial discretion." *Burns* v. *United States,* 287 U.S. 216, 220 (1932).

Probation of a person convicted of crime is a matter of grace. In a revocation proceeding the accused probationer is entitled to appear and explain away his accusation if he can. He is not entitled to a trial in any strict or formal sense. *Escoe* v. *Zerbst,* 295 U.S. 490 (1935); *Whitehead* v. *United States,* 155 F. 2d 460 (6th Cir. 1946).

We find no abuse of discretion on the part of the District Court in revoking appellant's probation. Appellant did not file his 1970 income tax return or pay his taxes on or before April 15, 1971, when due, as required by law (26 U.S.C. § 7203), nor had he procured an extension of time for the filing thereof. He was thus committing acts similar to those which brought about his previous conviction.

We are not required to consider and determine questions not presented to the District Court.

Appellant has filed a motion to remand so that he may present to the District Court alleged newly discovered evidence to the effect that subsequent to the revocation of his probation, namely, on June 4, 1971, the Director of Internal Revenue granted to him an "extension of time to file his federal income taxes up to and including June 15, 1971. The District Court, at the time of the revocation hearing, was aware of the fact that appellant had filed a belated return on May 22, 1971, on a form applicable to the previous year.

Appellant must address any motion to reinstate his probation to the District Court. It is not necessary that we remand for that purpose, as the District Court already has jurisdiction to hear such a motion if it is filed. The District Court is not required to apply to us for a remand unless prior to our remand it decides to reinstate his probation. *Cf. United States* v. *Lee*, 428 F. 2d 917, 923 (6th Cir. 1970). The motion to remand is therefore denied.

The judgment of the District Court is affirmed.

APPENDIX C

ORAL OPINION OF THE DISTRICT COURT
June 24, 1971 Transcript of Proceedings

(Convened, at 9:30 A.M., on Thursday, June 24, 1971, with appearances as noted heretofore, and the following proceedings occurred:)

* * *

By the Court: Preliminary to the disposition of the three motions pending in this matter, this Court would like to clearly express and assure to all persons including defendants' counsel, within the hearing of the Court, that the tenure and the independence of the Federal Judiciary under our Constitution, places this Court in a position where there is no power on earth able to intimidate it.

This includes the power of the Internal Revenue Service, the power of any press or other news media, and the power of those uninformed persons who are passionately motivated to action by results rather than by facts.

I adopt the factual background in this matter as expressed in the recent opinion herein in the United States Court of Appeals for the Sixth Circuit, bearing date of June 18, 1971.

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Further, it is my considered judgment from the motions and documents filed this date before me and the arguments heard that the subsequent, unilateral, improvident, and what I consider to be inconsiderate action toward me in this matter pending in my court by the Internal Revenue Service to be of absolutely no legal significance as it affects my discretion.

There is no necessity legally, for the granting by the Internal Revenue Service of the extension of the

filing of the return for the year 1970, when in actual fact a return on a 1969 form, changed to read 1970, had previously, belatedly, been filed by this defendant.

Defendant, as a lawyer, knows that once a return has been filed, he has the perfect liberty to file an amended return and he needs no extension.

The actions of the defendant and the Internal Revenue Service subsequent to the revocation by me, are merely efforts to catch up some stitches missed in the hemming of defendant's garments.

Accordingly, the motions this day filed are overruled and the Court reaffirms its order of revocation heretofore entered on May 26, 1971, as affirmed by the United States Court of Appeals for the Sixth Circuit on June 18, 1971.

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You desire an appeal of this order, I assume Mr. Haddad?

Mr. Haddad: Yes, we will file timely notice of appeal.

By the Court: Is he on bond from the Court of Appeals?

Mr. Haddad: Yes, sir.

By the Court: All right; let that bond continue in effect for the appeal of this record.

All right; we stand in recess.

APPENDIX D

OPINION OF SIXTH CIRCUIT COURT OF APPEALS—September 27, 1971

Before WEICK, PECK and BROOKS, Circuit Judges.

In the prior appeal we affirmed the order of the District Court revoking probation and remanded the case to that Court. *United States* v. *Tucker*, ____ F.2d ____ (6th Cir. No. 71-1432, June 18, 1971).

After the remand appellant Tucker filed in the District Court a motion and affidavit for a new hearing on the revocation of his probation, alleging newly discovered evidence. He also filed a motion to reinstate his probation. The motions were heard by the District Court upon arguments of counsel for Tucker and for the Government, and the Court, upon consideration, denied each of the motions and reaffirmed its previous orders. Tucker has appealed therefrom.

In our prior opinion we held that the District Court did not abuse its discretion in revoking probation, and we adhere to that opinion. The District Court did not consider that the alleged newly discovered evidence was sufficient to justify its changing its decision or its reinstating probation. We agree.

The motion to affirm is granted. The orders of the District Court are affirmed. The mandate shall issue forthwith. Rule 8, Sixth Circuit.

Entered by order of the Court.

In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-583

NEVILLE M. TUCKER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

In November 1970, petitioner, a police court judge, was convicted after pleading *nolo contendere* to a three count information of willfully failing to file his federal income tax returns for 1964, 1965 and 1966, in violation of Section 7203 of the Internal Revenue Code of 1954. He was sentenced to pay fines totaling $1,500 and to concurrent terms of six months imprisonment on each count. Execution of the sentence of imprisonment was suspended and petitioner was placed on probation for one year upon the conditions,

inter alia, that he conduct himself as a law-abiding citizen and report to the probation officer on the first working day of each month (R. 22a-24a;[1] Pet. App. 7a).

In May 1971, the probation officer reported to the district court (R. 31a) that petitioner had not timely filed his 1970 federal income tax return or obtained an extension of time for filing the return, though petitioner had represented that he had timely requested and received an extension. Petitioner responded to the court that he had filed a request for an extension on April 14, 1971, and that he had subsequently filed his 1970 income tax return (R. 9a-10a). The probation officer investigated these claims and reported that the extension request was incomplete when filed and thus had been returned to petitioner on April 18 with instructions to return it within 10 days, but that the completed form was not returned as required and no extension had been granted as of that date (May 24, 1971). The officer also indicated that petitioner's return was filed on May 22, 1971, and that four of the five monthly probation reports required since sentencing, which he had been permitted to submit by mail, were either filed late or not filed at all (R. 19a-21a).

On May 26, 1971, the district court, after a hearing at which petitioner was present and represented by counsel (R. 34a-39a), revoked petitioner's probation on the ground that petitioner had not timely filed a federal income tax return for 1970 and had not ob-

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[1] "R." references are to the record appendix filed in the court of appeals.

tained an extension for filing that return beyond the statutory due date of April 15, 1971 (R. 8a-9a, 20a-21a, 31a-32a, 38a). The court of appeals affirmed *per curiam* on June 18, 1971 (Pet. App. 7a-10a), and direct review of that decision has not been sought.

On June 23, 1971, petitioner filed in the district court a motion to reconsider the order revoking probation and to reinstate probation, urging as a reason that on May 28, 1971, subsequent to the original hearing, the Internal Revenue Service had granted him an extension to June 15, 1971, within which to file his 1970 return (R. 27a-29a). The district court again conducted a hearing, attended by petitioner and his counsel, and denied the motion (R. 30a). The court of appeals affirmed on September 28, 1971 (Pet. App. 13a).

1. Contrary to petitioner's assertion (Pet. 10-22), there is no issue now whether there was sufficient evidence supporting the revocation of his probation. That issue was determined by the first judgment of the court of appeals, on June 18, 1971; petitioner did not file a timely petition for certiorari to review that judgment nor did he make any effort to procure an extension of time for such a petition. Furthermore, in our view the record provides adequate evidence to show that the district court did not abuse his discretion either in revoking petitioner's probation or in refusing to reinstate it. These matters necessarily turn on factual issues and do not warrant review by this Court.

Since probation and the revocation thereof are discretionary matters, the court below correctly framed

the issue (Pet. App. 9a) as " 'simply whether there has been an abuse of discretion, and is to be determined in accordance with familiar principles governing the exercise of judicial discretion.' *Burns* v. *United States*, 287 U.S. 216, 220 (1932)."[2] Petitioner concededly failed to file his 1970 income tax return on April 15, 1971, and the application for an extension, which he mailed on April 14, 1971, was incomplete. As the information which was omitted is required not only by the form, but also by Section 1.6081-1(b)(2)(ii) of Treasury Regulations on Income Tax (1954 Code), the district court was correct in its observation (R. 38a) that petitioner could not expect to receive an extension on the basis of that application. Indeed, the Internal Revenue Service returned the application on April 18, 1971, with instructions that it be completed and returned within 10 days. Petitioner did not, however, refile the application until May 22, 1971, on which date he also filed what purported to be a 1970 federal tax return on a 1969 form. Meanwhile, on May 14, 1971, the probation officer inquired of petitioner whether he had

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[2] The quoted phrase appears at 287 U.S. at 222. See also *Escoe* v. *Zerbst*, 295 U.S. 490; *United States* v. *Nagelberg*, 413 F. 2d 708 (C.A. 2), certiorari denied, 396 U.S. 1010; *United States* v. *D'Amato*, 429 F. 2d 1284 (C.A. 3); *United States* v. *Cates*, 402 F. 2d 473 (C.A. 4); *United States* v. *Clanton*, 419 F. 2d 1304 (C.A. 5); *Whitehead* v. *United States*, 155 F. 2d 460 (C.A. 6), certiorari denied, 329 U.S. 747; *United States* v. *Weber*, 437 F. 2d 1218 (C.A. 7), certiorari denied, 402 U.S. 1008; *Douglas* v. *Sigler*, 386 F. 2d 684 (C.A. 8); *Longknife* v. *United States*, 381 F. 2d 17 (C.A. 9), certiorari denied, 390 U.S. 926; *Yates* v. *United States*, 308 F. 2d 737 (C.A. 10).

requested an extension for his federal tax return and was told by petitioner that an extension had been granted, that it would expire in three days, and that the form was at petitioner's home (R. 8a, 20a, 32a). When the district court received the probation officer's report that no record of a return or of an extension had been found, the court scheduled a probation revocation hearing for May 26, 1971. At that hearing, petitioner's only explanation of his actions, besides his protestation that he intended to comply with the law, was that in talking to the probation officer he did not have the extension application form in hand, and that when he found that document he sent it to his attorneys (R. 37a).

In these circumstances, it was no abuse of discretion for the district court to revoke probation following the hearing on May 26, 1971. At that time petitioner had neither filed a timely return for 1970 nor obtained an extension. Thus, as the court below observed (Pet. App. 9a), he was then "committing acts similar to those which brought about his previous conviction." Moreover, petitioner had failed to submit the monthly probation reports on the required dates, and had made untruthful statements to the probation officer concerning the extension application, all of which indicated a disregard of the probation conditions and supported revoking the probation.

Nor was the district court obliged to reinstate probation when subsequently the Internal Revenue Service granted petitioner an extension. That extension may or may not relieve petitioner of the normal pen-

alties for late filing.[3] More important, petitioner had failed to comply promptly with the federal tax laws, which in similar circumstances had resulted in his earlier criminal acts and conviction, and had finally completed the extension application and his 1970 federal return only following the prodding of the inquiries and report by the probation officer. The district court did not abuse its discretion by holding that the granting of the extension was not sufficient to support reinstating probation.[4]

2. Petitioner's other contentions are without substance. While petitioner asserts (Pet. 22-24) that the conditions of his probation were overly vague, he did not object at the time the conditions were imposed, and in fact signed a statement to the effect that he had read and fully understood and would abide by them (R. 24a). This issue was raised for the first time in the court of appeals, on petitioner's first ap-

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[3] Petitioner's application (R. 11a) stated he needed an extension because "I have been unable to secure information on deductions expenses." If, upon audit, the Internal Revenue Service should find this reason not supportable under the circumstances, petitioner could be required to establish reasonable cause for failure to pay on April 15, 1971, in order to avoid penalties. See Technical Information Release No. 1034, April 6, 1970, 1970-7 C.C.H. Federal Income Tax, par. 6542.

[4] Petitioner argues (Pet. 25) that denying him probation was improper because the government did not prove that he was guilty of a criminal violation under Section 7203 of the Code, by not showing that he willfully failed to file his 1970 return. There is no requirement in a probation revoction proceeding, however, that criminal conduct be proven, but rather only that there be a reasonable showing that the conditions of probation have not been met. See *Burns* v. *United States*, *supra*. As indicated above, we think that that standard

peal following revocation of his probation, and was not considered or determined in the judgments of the court of appeals. In our view the probation conditions were entirely proper,[5] but, in any event, we do not think that petitioner should be able to complain of them now. See *United States* v. *Weber*, 437 F. 2d 1218 (C.A. 7), certiorari denied, 402 U.S. 1008; *Yates* v. *United States*, 308 F. 2d 737 (C.A. 10).

Nor is there any basis for the suggestion (Pet. 26) that petitioner's probation was revoked without an evidentiary hearing. A hearing was conducted by the district court both when revocation was urged and when petitioner sought reinstatement (see pp. 2-3, *supra*). This distinguishes the present case from the cases relied on by petitioner.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

SCOTT P. CRAMPTON,
Assistant Attorney General.

CROMBIE J. D. GARRETT,
JOHN P. BURKE,
CARLETON D. POWELL,
Attorneys.

NOVEMBER 1971.

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[5] Contrary to petitioner's claim (Pet. 24), the requirement (R. 23a) that petitioner conduct himself "as a law-abiding, industrious citizen" sets a definite, intelligible standard and is almost identical to the condition which this Court upheld in *Burns* v. *United States*, *supra*.

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Supreme Court, U.S.
FILED
DEC 29 1971
E. ROBERT SEAVER, CLERK

IN THE

Supreme Court Of The United States

October Term, 1971
No. 71-583

NEVILLE M. TUCKER,
Petitioner

versus

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITIONER'S REPLY TO THE UNITED STATES' MEMORANDUM IN OPPOSITION

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1971
No. 71-583

NEVILLE M. TUCKER,
Petitioner

vs.

UNITED STATES OF AMERICA,
Respondent.

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May it please the Court:

After reviewing Respondent's Memorandum in Opposition to the Petition for a Writ of Certiorari, Petitioner is constrained to reply to the Respondent's misleading and inaccurate statements. First, Respondent, by innuendo and inference, would have this Court believe that Petitioner lied to his probation officer when he "represented that he had timely requested" an extension (R. 8a[1]; Mem. U.S.2). Petitioner, in fact, on April 14, 1971 submitted an "Application for Extension of Time to File" to the Internal Revenue

[1]"R." references are to the record appendix filed in the Sixth Circuit Court of Appeals.

Service (R. 9a, 11a). Second, Respondent submits, for this Court's consideration, allegations which were neither found in the Probation Petition of May 18, 1971, nor presented to the District Court at the Hearings of May 28. 1971, or June 24, 1971 (R. 8a, 34a-56a). Neither the Respondent nor the courts have ever made the question of Petitioner's punctuality in submitting his monthly probation reports an issue in this case. Moreover, Petitioner's veracity in his discussions with the probation officer has never been an issue in this case.

Third, the Respondent alleges that the sufficiency of the evidence supporting revocation of Petitioner's probation is not an issue in the case. While Petitioner's appeal to the Sixth Circuit Court of Appeals, was pending, the Internal Revenue Service acted upon Petitioner's completed request for extension of time, giving him until June 15, 1971, to file his tax return. At the time of oral argument on appeal, Petitioner's counsel advised the Sixth Circuit Court of Appeals of this newly discovered evidence, namely, the extension having been granted by the Internal Revenue Service. On June 11, 1971, while the appeal was still pending, Petitioner filed a motion asking the District Court to request the Sixth Circuit to remand the case to the District Court in order that these newly discovered facts could be considered by the District Court. On June 15, 1971, the District Court granted Petitioner's motion for a hearing and set the hearing for June 24, 1971. The Sixth Circuit, prior to this

hearing, rendered its decision on June 18, 1971, and stated that it was not necessary for it to remand in order for the District Court to consider the newly discovered evidence, stating that the Circuit Court was not required to consider and determine questions not presented to the District Court (R. 33a).

On June 24, 1971, the District Court Judge had before him motions which, in fact and substance, sought a new hearing or new trial for the Petitioner based upon newly discovered evidence which had occurred subsequent to the Court's earlier decision revoking Petitioner's probation. Rule 33 of the Federal Rules of Criminal Procedure states:

> "The court on motion of a defendant may grant a new trial to him if required in the interest of justice. * * * A motion for a new trial based on the ground of newly discovered evidence may be made only before or within two years after the final judgment, but if an appeal is pending the court may grant the motion only on remand of the case. * * * "

As stated in Rule 33, a motion for a new trial, based on the ground of newly discovered evidence, may be made only before or within two years after final judgment, but if an appeal is pending, the Court may grant the motion only on remand of the case. Petitioner followed the precise procedure required by Rule 33 by requesting the District Court to have the Sixth Circuit Court of Appeals remand the case and to grant him a new hearing based upon the newly discovered evidence.

No one can seriously question the District Court's authority to grant a new hearing based on newly discovered evidence and to reinstate the Petitioner's probation. The Sixth Circuit Court of Appeals recognized as much on page 5 of its Opinion in the original appeal of the *United States of America* v. *Neville M. Tucker,* decided June 18, 1971 (R. 33a).

Petitioner respectfully submits that the precise question involved in this case is whether there was, or is now, evidence to support the revocation of probation and sentence of imprisonment. For the reasons cited herein and in the Petition for Writ of Certiorari, Certiorari should be granted and the judgment reversed.

Respectfully submitted,

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